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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTONIO BARAJAS,

Defendant and Appellant.

B156115

(Super. Ct. No. VA066182)

APPEAL from a judgment of the Superior Court of Los Angeles County. Phillip S. Gutierrez, Judge. Affirmed.

Vanessa Place, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Victoria B. Wilson, Supervising Deputy Attorney General, and Jennifer A. Jadovitz, Deputy Attorney General, for Plaintiff and Respondent.

## INTRODUCTION

Appellant Antonio Barajas challenges his lewd conduct with a child conviction on the grounds CALJIC No. 17.41.1 is an improper instruction and the trial court miscalculated his pre-sentence conduct credits. We conclude any error in instructing the jury with CALJIC No. 17.41.1 was harmless and find the trial court's credit calculations correct.

## BACKGROUND AND PROCEDURAL HISTORY

Two girls, aged eight and ten, testified that on two occasions appellant reached under their clothing and touched or rubbed them.

A jury convicted appellant of two counts of committing a lewd act upon a child under the age of 14. As to each count, the jury also found appellant had committed the offenses on more than one victim at the same time and in the same course of conduct. (Pen. Code, § 1203.066, subd. (a)(7).) The trial court sentenced appellant to five years in prison.

## DISCUSSION

### **1. The trial court did not err by instructing the jury with CALJIC No. 17.41.1.**

Appellant contends the trial court erred by instructing the jury with CALJIC No. 17.41.1. In *People v. Engelman* (2002) 28 Cal.4th 436, the California Supreme Court disapproved of CALJIC 17.41.1 and forbade trial courts giving it in future proceedings. (*Id.* at pp. 449.) The Court expressed concern that the instruction created “a risk of unnecessary intrusion on the deliberative process.” (*Id.* at p. 441.) Nonetheless, the Court concluded that giving the instruction did not infringe upon federal or state constitutional rights and was not error. (*Id.* at pp. 449.)

As in *Engelman*, there was no indication the jury encountered any problems during deliberations. It did not deadlock or report that anyone refused to deliberate or follow the law. It did not request further instruction and asked only whether a not guilty verdict was the same as acquittal. In short, there was no indication that the potential risk

created by CALJIC No. 17.41.1 was realized in this case. Accordingly, appellant's claim has no merit.

**2. The trial court correctly calculated appellant's presentence credits.**

The trial court awarded appellant 211 days of pre-sentence custody credits, consisting of 184 days of actual custody and 27 days of good-time/work-time credits. Appellant agrees he spent 184 days in custody and acknowledges that Penal Code section 2933.1, subdivision (c), limits his good-time/work-time credits to 15 percent of the number of actual custody days. However, he contends application of this formula should have resulted in an award of 31 days for good-time/work-time credits.

Fifteen percent of 184 is 27.6. The trial court's credit calculation therefore was correct, and appellant is not entitled to additional credit.

**DISPOSITION**

The judgment is affirmed.

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BOLAND, J.

We concur:

COOPER, P.J.

RUBIN, J.